No. 96-110

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1996

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,
Attorney General of Washington,
Petitioners,

v.

HAROLD GLUCKSBERG, M.D.,
ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D.,
AND PETER SHALIT, M.D., PH.D.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. WASHINGTON'S ASSISTED SUICIDE STATUTE DOES NOT VIOLATE DUE PROCESS

This case involves a challenge to Wash. Rev. Code 9A.36.060, a statute adopted in 1975 as a recodification of pre-existing statutes dating back to the first Territorial Legislature. Br. Pet'rs at 4-6; App. Pet. Cert. at G-1 to G-3.

The precise legal issues in this case are whether there is a constitutionally protected liberty interest under the Due Process Clause in committing suicide that includes assistance in so doing; and, if so, whether the statute is nonetheless constitutional because it advances legitimate state interests.[1]

The Due Process Clause of the Fourteenth Amendment protects, *inter alia*, "life, liberty, or property" against state deprivation. This case involves two of those components—life and liberty. The outcome of the case will determine whether a State must value the liberty claims of a few when those claims conflict with a State's goal of protecting the lives of *all* its people.

A. Respondents Disregard The Court's Well-Established Analytical Approach To Substantive Due Process

The issue arises under "the substantive component of the [Due Process] Clause that protects individual liberty

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[1] Respondents proffer the Equal Protection Clause as an alternative theory to support the decision below. Br. Resp'ts at 42-47. Petitioners have previously demonstrated that Washington law does not violate the Equal Protection Clause. Pet. Writ Cert. at 22-26; Br. Pet'rs at 41-44. *See also Vacco* Br. Pet'rs at 9-19; *Vacco* Br. Amici Curiae States Supp. Pet'rs; *Vacco* United States Amicus Curiae Supp. Pet'rs. Accordingly, Petitioners focus this brief on the Due Process arguments advanced by Respondents and their amici.

against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

This Court has developed certain enduring principles as "guideposts for responsible decisionmaking" in the "unchartered area" (*id.*) of substantive due process analysis.

The "analysis must begin with a careful description of the asserted right, for 'the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins*, 503 U.S. at 125).

The Court then determines whether the asserted liberty claim is "implicit in the concept of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) or "deeply rooted in this Nation's history and tradition" (*Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)). Reliance on the Nation's history and tradition provides an objective framework within which to make the ultimately subjective determination as to whether a particular activity is, or is not, a component of the liberty protected by the Due Process Clause.

The Court's careful and consistent application of these principles serves "to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Expressed another way, "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history and solid recognition of the basic values that underlie our society.'" *Moore*, 431 U.S. at 503 (quoting *Griswold*

v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

Respondents' approach to the threshold question—whether there is a constitutionally protected liberty interest at all—ignores the Court's established analytical approach. Rather, they assert:

> " The proper question is whether society, and the Court's constitutional interpretation, has afforded individuals the right to make personal decisions regarding their bodies, medical care, and life-course without burdensome government intrusion." Br. Resp'ts at 17-18.[2]

Respondents pose the wrong question. The question is not whether some activities involving personal decisions affecting bodily integrity *have* been accorded constitutional protection. Rather, the issue in this case is whether the decision to commit suicide, and having assistance in carrying out that decision, *is to be* protected by the Constitution. The answer to this question is plainly no.

Neither Respondents nor their New York counterparts make any effort to demonstrate that the asserted right to assisted suicide is "deeply rooted in our Nation's history and tradition" (*Moore*, 431 U.S. at 503) or "implicit in the concept of ordered liberty," (*Palko*, 302 U.S. at 325) having presumably concluded, for good reason, that any such enterprise would fail.[3] "Nor can it be said that the

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[2] Respondents do not attempt to defend the Ninth Circuit's broadly phrased recognition of a liberty interest in "determining the time and manner of one's death." App. Pet. Cert. at A-27.

[3] Respondents rely on the ineffective effort of the Ninth Circuit to find historical support for the notion of a right to commit suicide, asserting that "the historical record is checkered." Br. Resp'ts

right to assisted suicide claimed by [Respondents] is deeply rooted in the nation's traditions and history. Indeed, the very opposite is true." *Quill v. Vacco*, 80 F.3d 716, 724 (2d Cir. 1996), *cert. granted sub nom, Vacco v. Quill*, Case No. 19-1858. *See* Br. Pet'rs at 21-25. *See generally* Br. Amicus Curiae State Legis. Supp. Pet'rs.[4]

Respondents' liberty interest argument rests on their expansive view of the Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* followed two decades of multiple, contentious challenges to the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), which held that previously recognized constitutional protections accorded to procreation included the right of a woman to obtain an abortion. The *Casey* Court declined to overrule *Roe*, concluding instead that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Casey*, 505 U.S. at 846.

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at 18 n.9. Their New York counterparts completely ignore the history and tradition prong of this Court's jurisprudential approach. See generally *Vacco* Br. Resp'ts. The ACLU repeats—but does not improve upon—the Ninth Circuit's historical analysis. *See* Br. Amici Curiae Supp. Resp'ts of ACLU at 4-7.

[4] The Court's reliance on the history and tradition of our country does not reflect an "historically frozen concept of constitutionally protected liberty." Br. Nat'l Women's Health Network Amici Curiae Supp. Resp'ts at 10 n.11. Rather, it provides the means whereby the Court can assure that its jurisprudence

> " represent[s] the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

The *Casey* Court's one hundred ten page explanation of its decision included a paragraph in which the Court summarized its prior decisions affording constitutional protection to "marriage, procreation, contraception, family relationships, child rearing, and education." *Casey*, 505 U.S. at 851. The last three sentences of that paragraph describe common elements of the particular activities addressed in those previous cases:

> " These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.*

In effect, Respondents argue that these last three sentences from *Casey* stand for the proposition that *all* "intimate and personal choices a person may make in a lifetime" (*id.*) are constitutionally protected. According to Respondents' logic, a decision to end one's life is "intimate and personal"—therefore, such a decision is, like the abortion decision at issue in *Casey*, constitutionally protected.

Respondents misread *Casey*. The language from *Casey* on which Respondents rely is *descriptive*, not *prescriptive*. It *describes* certain specific actions to which constitutional protection had previously been accorded. It does not purport to *prescribe* that any activity falling within the grammatical construct of the passage necessarily

qualifies for enhanced protection under the "liberty" component of the Due Process Clause.[5]

Respondents' view of the *Casey* decision is that the passage quoted above represents a new formulation of the test for identifying liberty interests entitled to heightened protection under the Due Process Clause. Under Respondents' view, *Casey* represents a wholesale departure from the Court's prior due process jurisprudence. The traditional test—whether a particular claim to liberty is "deeply rooted in this Nation's history and tradition" (*Moore*, 431 U.S. at 503) or "implicit in the concept of ordered liberty" (*Palko*, 302 U.S. at 325)—no longer applies. Rather, according to Respondents, liberty interests after *Casey* are defined as those matters "involving the most intimate and personal choices a person may make in a lifetime [including] choices central to personal dignity and autonomy." *Casey*, 503 U.S. at 851.

Under Respondents' view, not only did the *Casey* opinion jettison the Court's test for determining the existence of a constitutionally protected liberty interest, it also cast doubt on the continued viability of several of the Court's prior decisions. *See, for example, Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973) (rejecting a claim of constitutional protection to conduct on the basis that it involved only consenting adults). The Court in *Slaton* catalogued other cases where the Court had upheld statutes

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[5] Respondents' analysis under *Casey* is based on a flawed syllogism, along the following lines: Apples, oranges, and grapefruit are fruits. They are round in shape and edible. A cabbage is also round in shape and edible; therefore, a cabbage must be a fruit as well. A choice to commit suicide, though "intimate and personal," is of a fundamentally different nature than the choice to marry, to have a child (or not), to live with one's grandchildren, or to send them to a private school. *See* Br. Pet'rs at 25-28.

regulating conduct arguably included within the scope of the language from *Casey* quoted above, and noted that "[t]he state statute books are replete with constitutionally unchallenged laws against prostitution, *suicide*, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels." *Id.* at 68-69 n.15 (emphasis added).[6]

Indeed, even the *Roe* Court's rejection of the proposition "that one has an unlimited right to do with one's body as one pleases" (*Roe*, 410 U.S. at 154) is subject to revisitation if, indeed, Respondents' expansive view of the *Casey* decision is correct.

Respondents' view of *Casey* is *not* correct. *Casey* was grounded in the principles of the Court's prior jurisprudence—relied on in *Roe*—which recognized that decisions about procreation are "implicit in the concept of ordered liberty" (*Palko*, 302 U.S. at 325) and thus protected under the Due Process Clause.[7] The *Casey* decision was bolstered by principles of *stare decisis*, the application of which serve to strengthen "the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Casey*, 505 U.S. at 865, *and see generally* 864-69; *see also* Br. Pet'rs at 31-33.

By arguing that this Court should abandon the use of the Nation's history and tradition and the concept of ordered liberty as the primary "guideposts for responsible

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[6] At the time this opinion was written, no State criminalized attempted suicide; therefore, the reference to "suicide" must have been to assisted suicide statutes such as that at issue here.

[7] *Roe* also concluded that prior to laws adopted in the latter half of the 19th century, largely to protect women's health, women gener-ally had access to an abortion, especially early in pregnancy. *Roe*, 410 U.S. at 140-41. Thus, its decision protecting a woman's access to an abortion was not contrary to the Nation's history and tradition.

decisionmaking" (*Collins*, 503 U.S. at 125) in the due process arena, Respondents acknowledge that the decision below can only be affirmed if in fact the *Casey* decision represents a wholesale rejection of the Court's prior analytical approach rather than a principled reaffirmation of "the essential holding of *Roe v. Wade*" (*Casey*, 505 U.S. at 846). *See* Br. Resp'ts at 11-22; *Vacco* Br. Resp'ts at 19-28; *see also* Br. Amici State Leg. Supp. Resp'ts at 4-6.

Indeed, Respondents' New York counterparts assert that failure to affirm the decision below on the basis of *Casey* "would render this Court's decision in *Casey* itself vulnerable to repudiation as unprincipled and *ad hoc*, an illegitimate interference with the power of the State." *Vacco* Br. Resp'ts at 24 n.10. This is exactly wrong. The *Casey* decision, though controversial, was grounded in this Court's traditional jurisprudential approach and demonstrated that the *Roe* decision was the outgrowth of the constitutional protection to decisions about contraception and procreation. To suggest, as the New York Respondents do, that *Casey*'s credibility rises or falls with the instant case does a disservice to the authors of the *Casey* opinion by suggesting its constitutional analysis cannot stand on its own.

B. Respondents' Liberty Interest Argument Is Unprincipled And Illogical

Three other aspects of Respondents' liberty interest argument merit mention.

First, Respondents and their New York counterparts claim that the interest they seek to enshrine as a constitutional right is limited: "The *present* case is limited to those who seek a humane, hastened death . . . because they are dying *and* suffering unbearably in the process." Br. Resp'ts at 33 (emphasis added). *See also Vacco* Br. Resp'ts at 21 ("the only right asserted by the patient-plaintiffs and claimed before this Court is the right of

the competent, terminally ill patient to choose whether to endure a death marked by intolerable agony, degradation, and suffering").[8]

Yet the doctrinal support they offer for this asserted right does not supply the limits they claim.[9] For example, Respondents argue that "[t]he decision how to die is the final life-shaping decision a person can make." Br. Resp'ts at 17. Does not this statement apply with equal force to *anyone* who commits suicide, not just the terminally ill? As the panel opinion below noted:

> " The depressed twenty-one year old, the romantically-devastated twenty-eight year old, the alcoholic forty-year old who choose suicide are also

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[8] It is doubtful, of course, that the "right," if it exists, can be so limited as Respondents suggest. *See* Br. Pet'rs at 44-47; Br. Am. Geriatrics Soc'y Amicus Curiae [Supp. Pet'rs] at 15-27.

[9] In the same vein, the Solicitor General suggests the existence of a liberty interest with no doctrinal limitation to the terminally ill. Relying on cases involving the procedural protections of the Due Process Clause, he asserts that the substantive component protects a liberty interest in "avoiding severe pain or suffering." Br. United States Amicus Curiae Supp. Pet'rs at 14. This assertion misses the mark in two ways. A requirement of procedural protection under the Due Process Clause does not equate to the special protection accorded certain fundamental liberty interests under the substantive component of the Clause. Moreover, "[t]he question presented . . . is not whether a person has a constitutional right . . . not to suffer. Rather, the question . . . is whether the constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance." *People v. Kevorkian*, 447 Mich. 436, 476 n.47, 527 N.W.2d 714, 730 n.47 (1994), *cert. denied*, 115 S. Ct. 1785 (1995). Petitioners agree with the ultimate conclusion advanced by the United States that the Washington statute does not violate the Due Process Clause. However, the constitutional analysis utilized in arriving at a particular conclusion is often as important as the conclusion itself.

> expressing their views of the existence, meaning, the universe, and life; they are also asserting their personal liberty. If at the heart of the liberty protected by the Fourteenth Amendment is the uncurtailable ability to believe and to act on one's deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of at least every sane adult." App. Pet. Cert. at D-12; *see also* Br. Am. Suicide Found. Amicus Curiae [Supp. Pet'rs] at 5-12.[10]

Respondents' argument for a right that belongs to some but not all—"[t]here is no right for those patients who are not terminally ill and not imminently facing death" (Br. Resp'ts at 35 n.23)—belies any claim that the asserted right to assisted suicide is "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 325.

Second, although Respondents and their amici argue for a right to assisted suicide for mentally competent, terminally ill patients, their amici, like the court below, at the same time recognize that "State laws or regulations governing physician-assisted suicide are *both necessary and desirable* to ensure against errors and abuse, and to protect legitimate state interests." App. Pet. Cert. A-102 (emphasis added). *See, e.g.*, Br. Amici ACLU (urging "support [for] the use of legislative safeguards"); *Vacco* Br. Resp'ts at 3 ("Close regulation is required for many of the reasons put forward by petitioners and their *amici*."); Br. Amici Curiae of Coun. for Secular Humanism Supp. Resp'ts at 14 ("[N]o

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[10] Similarly, Respondents' Equal Protection arguments are not doctrinally limited to the terminally ill. The right to refuse medical treatment belongs to everyone. Respondents' arguments that assisted suicide is no different than refusing medical treatment are no more persuasive in the due process context than they are in the equal protection concept.

responsible proponent of legalized assisted suicide maintains that the practice should not be subject to *stringent* regulation." (emphasis added)).[11]

The apparent consensus among the proponents of the asserted right, that it must be carefully controlled to limit its exercise by the public at large, is strong evidence that it has no nexus to the concept of "liberty" as that term is understood in common parlance or as reflected in this Court's Due Process Clause jurisprudence.

What other liberty interest granted constitutional protection by this Court has carried with it a recommendation by its advocates that the exercise of the claimed liberty must be (1) limited to only a few people and (2) closely regulated to avoid its abuse? The answer, of course, is none. One can only imagine the hue and outcry that would arise—and rightfully so—should the suggestion be advanced that the nature of other constitutionally protected liberty interests—marriage, procreation, family relationships, pre-viability abortions—*requires* that they be carefully regulated, lest the right be abused. *See also* Br. Am. Med. Ass'n Amici Curiae Supp. Pet'rs at 25-26; Br. Bioethics Professors Amicus Curiae Supp. Pet'rs at 23-26.

Finally, it is just not true, as Respondents and their New York counterparts claim, that affirming the decision below is "essential to ensure that the government not be empowered either to deny the option of a hastened death or to compel one." Br. Resp'ts at 22; *see also Vacco* Br.

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[11] Of course, these concerns are well-justified. *See* Br. Dist. Atty. Milwaukee Cy. Amicus Curiae Supp. Pet'rs (arguing that creating a constitutionally mandated exemption from States' homicide laws for physician-assisted suicide "will cause grave practical difficulties in the enforcement of our homicide laws" (at 2) and cateloguing (at 12-16, and in the appendix) examples of "intrafamily and other homicides" (at 12) where the decision below is problematic to law enforcement).

Resp'ts at 29-30. This argument is based on the *Casey* Court's recognition that failure to recognize a *liberty* interest in the abortion context could lead to a situation where "the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it." *Casey*, 505 U.S. at 859.

Unlike the abortion context, in which the liberty protection is a "two-way street" (*Vacco* Br. Resp'ts at 30), any purported action by a State to "compel" an early death for those for whom Respondents advocate would run afoul of the State's duty, also under the Fourteenth Amendment, to protect *life*.[12]

The *Roe* opinion made clear that the decision to abort a nonviable fetus does not implicate the life of a person: "[A]n abortion is not 'the termination of life entitled to Fourteenth Amendment protection.'" *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part) (quoting *Roe*, 410 U.S. at 159). Had the contrary been true, the *Roe* Court noted, "the [argument for a right to abortion] collapses, for the fetus' right to life is then guaranteed specifically by the [Fourteenth] Amendment." *Roe*, 410 U.S. at 156-57.

It is inarguable that assisted suicide *does* involve the taking of *life* entitled to Fourteenth Amendment protection. Declining to recognize a liberty interest in assisted suicide would not leave the terminally ill—or anyone else—exposed to a risk of State-compelled death.[13]

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[12] *See* Br. Amicus Curiae States Supp. Pet'rs at 10-13 (arguing that recognizing a "liberty" interest to take a life is contrary to the language and design of the Due Process Clause).

[13] On the other hand, recognizing a liberty interest in assisted suicide may indeed create a "one-way street" in the wrong direction by implying that some lives are entitled to lesser protection

C. Washington's Statute Furthers Important State Interests

Even if the Court finds the existence of a constitutionally protected liberty interest, that does not end the inquiry. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279 (1990). Rather, the Court must then decide whether the statute nonetheless prevails over whatever liberty interest may be involved, because it furthers legitimate State interests. *Id.*

The Court has identified two tests by which statutes not implicating abortion rights are measured.[14] At a threshold level, the statute must rationally advance legitimate State interests. *Reno*, 507 U.S. at 301-03. If a statute burdens a fundamental liberty interest, it must be "narrowly tailored to serve a compelling state interest." *Id.* at 302.[15]

The Respondents and their amici acknowledge the existence of important State interests:

> •" The State has a *strong* interest in protecting against usurpation of the dying patient's wishes by others. . . . The State retains an

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than others. *See* Br. Nat'l Spinal Cord Injury Ass'n Amicus Curiae Supp. [Pet'rs] at 1-3, 17-36; Br. Amici Curiae Nat'l Legal Ctr. for Medically Dependent & Disabled Supp. Pet'rs at 12-24.

[14] Statutes regulating abortion rights are judged by the undue burden standard announced in *Casey*: "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878. This test has not been applied outside of the abortion context.

[15] Not even Respondents contend that the subjective "sliding scale" balancing test performed by the Ninth Circuit below was correct.

> *undiminished*interest in ensuring that the lives of such patients, however short, are protected against extinction against their will by third parties." Br. Resp'ts at 31 (emphasis added).
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> •" The State's interest in protecting incompetent individuals is . . . of *great weight.*" *Id.* at 34 (emphasis added).
>
> •" Undoubtedly the protection of people who might seek to end life mistakenly or under pressure is a *compelling* interest." *Vacco* Br. Resp'ts at 37 (emphasis added).

The Court has previously acknowledged the important role that statutes such as that at issue here serve in furthering the States' interest in protecting the lives of its citizens:

> " As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Cruzan*, 497 U.S. at 280.

Respondents assert that the statute at issue does not meet either applicable test, arguing that it is both "overinclusive" and "underinclusive," and that, in their judgment, a regulatory approach in which physician-assisted suicide is allowed to some but not to all would "better protect" these State interests. *See generally* Br. Resp'ts at 28-39. Yet neither Respondents nor their *amici* deny that *any* attempt to legalize assisted suicide would inevitably lead

to at least some persons dying either prematurely or involuntarily, or both.[16]

The reality of human mortality is that there is a continuum of circumstances under which we perish. *See* Br. Am. Geriatrics Soc'y at 4-11. Respondents describe tragic individual stories that are close to the line that now separates "*letting* the patient die [from] *making* the patient die." S. Carter, *The Culture of Disbelief* 236 (1993) (emphasis in original). Respondents appear to hope that these terrible stories will evoke an emotional reaction that will lead this Court to mandate moving that line.

But Respondents do not offer a workable stopping point along the continuum where a new line can be established—in effect, their argument provides the "slippery slope." If refusing medical care equals assisted suicide for the terminally ill, why not for the chronically ill or the just plain unhappy, who have the same right to refuse treatment? If assisted suicide is equivalent to health care, can allowing a guardian to consent to one and not the other pass the equal protection test Respondents suggest? While there may indeed be individual circumstances that are not well-served by the current line, a State legislature could reasonably—and rationally—conclude that "there is no line other than [that

16 *See, e.g.*, Br. Resp'ts at 36 ("diagnosis of terminal illness is not infallible"); Br. Amici ACLU at 20 (asserting that safeguards would reduce the "likelihood of misdiagnosis to a very small order of probability," an error rate that it presumably believes is acceptable); Br. Amicus Curiae Julien M. Whitaker, M.D., Supp. Resp'ts at 22 ("There can be no doubt that from time to time certain individuals possessed of malicious intent (whether family members, friends, or physicians) will exert an untoward influence on the terminally ill, urging them to make a decision for or against physician-assisted suicide that may not be the one the patient would make if fully possessed of independent reason.").

drawn by current law] that works better." *Casey*, 505 U.S. at 870.

In short, Respondents contend that the State is required to adopt a policy that sacrifices the lives of at least some of its citizens in order to accommodate the interests of those for whom they advocate. A military commander preparing for battle must accept the inevitability of casualties and develop battle plans designed to keep them to an "acceptable" level. State legislatures, when crafting public policy, should not be constitutionally required to engage in the same calculus.

The compelling nature of the State's interest in protecting the lives of its citizens, combined with the profound impact on at least some of those citizens should Respondents' arguments prevail, demonstrate that the Washington statute passes constitutional muster regardless of which test the Court applies.

D. Respondents Oversimplify The Complexity Of The Task Before The Court

Respondents assert that "[t]he present case is limited to those who seek a humane, hastened death . . . because they are dying and suffering unbearably in the process." Br. Resp'ts at 33. While the "present case" may be limited as Respondents suggest,[17] there is no doubt that recognition of a liberty interest in physician-assisted suicide sufficient to invalidate the Washington statute will generate several more rounds of litigation challenging whatever limits or procedures a State may craft. It is not difficult to imagine

[17] The Ninth Circuit did not see the case as necessarily limited to the mentally competent (App. Pet. Cert. at A-101 n.120), to assisted suicide (as opposed to voluntary euthanasia) (*id.* at A-100), or, for that matter, to physicians (*id.* at A-116 n.140).

this Court being asked to rule on the constitutionality of at least the following:

> • whether a particular State's definition of "terminal illness" is too restrictive;
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> • whether a State's requirement for two, or three, "or an entire committee of physicians" (Br. Amici ACLU at 20 n.30) to verify the patient's condition is too onerous;
>
> • whether a State's standard of determining mental competence unduly limits access to assisted suicide;
>
> • a State's requirement that mental competence be evaluated by a psychiatrist or psychologist;[18]
>
> • a State's requirement for a waiting period between an initial request for physician-assisted suicide and the provision of assistance;[19]
>
> • a State's procedural requirement for consultation with family members;[20]

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[18] The Brief Of The Washington State Psychological Association, et al., Amici Curiae In Support Of Respondents, at page 24 note 9, notes such a limitation under the recently approved Oregon Measure 16 and argues that "other mental health professionals, including social workers and professional counselors [with appropriate training] would also be capable of performing such evaluations."

[19] *Cf. Casey*, 505 U.S. at 885-87 (upholding a Pennsylvania twenty-four hour waiting period for obtaining an abortion); *see* Or. Rev. Stat. § 127.840 (requiring two oral requests at least fifteen days apart for life-ending medication before it can be provided); *see also* Br. Amici Curiae Gary Lee, M.D., Supp. Pet'rs at 17 (criticizing the fifteen-day period of the Oregon statute as too narrow).

[20] The guidelines developed by Compassion in Dying, a plaintiff below, specify that "[a]ssistance with suicide will not be provided if there is expressed disapproval by members of the im-

• a State's requirement that the medication be self-administered;[21]

• whether the limitations suggested by the Respondents—terminal illness, mental competence, even adulthood—are themselves constitutionally defensible.

Respondents suggest that States are able to answer these questions "as an initial matter" (Br. Resp'ts at 35) and "subject to undue burden analysis" (Br. Resp'ts at 42 n.29). That may be true, but it is also inarguable that the final answer to these and other myriad issues raised by the decision below will have to come from this Court, should the statute at issue be struck down as Respondents and their amici argue it should be.

II. THE WASHINGTON STATUTE REFLECTS THE IMPORTANT VALUE OUR SOCIETY PLACES ON PROTECTING AND PRESERVING LIFE

This case, and the issues surrounding it, present no easy answers. In the final analysis, the fulcrum of decision on the issue of physician-assisted suicide is a value judgment between respecting the autonomy of some versus protecting the lives of all. The historic, and current, judgment

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mediate family." J.A. at 13-14. The court below noted that "a similar requirement by the state would raise constitutional concerns." App. Pet. Cert. at A-90 n.100.

[21] *See Vacco* Br. Resp'ts at 40 n.20 ("any competent individual, however disabled, who is able . . . to *communicate* a voluntary decision to receive life-ending medication could certainly be enabled, through modern technology, to *self-administer* it" (emphasis in original)). *But see* Br. Amici Curiae Gay Men's Health Clinic Supp. Resp'ts at 19 n.9 (acknowledging that some patients would require "the assistance of [their] physician[s] in administering the drug").

reflected in the statute at issue here values the lives of those whom the statute protects over the autonomy of those whose suicides the statute prevents.

Whether that value judgment has changed or should change is a topic of discussion and debate throughout the land. *See* Br. Pet'rs at 9-16. Unless foreshortened by a pre-emptive decision from this Court, this debate will no doubt continue.

As the New York Task Force concluded, a decision in favor of allowing physician-assisted suicide, even in limited form, will do more than change the law. It will change our society.

> " The prohibition against assisted suicide and euthanasia carries intense symbolic and practical significance. While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions.
>
> " If assisted suicide and euthanasia are legalized, it will reflect changed attitudes about the practices. Just as significant, it will prompt further change. Social attitudes will evolve in part because our laws convey acceptance and sanction. More far reaching will be the shift in attitude as assisted suicide or direct killing become more frequent and more widely practiced. If the practices become a standard part of the arsenal of medical treatments, it would profoundly affect our response to those cases that are sanctioned and to those that are not. The momentous nature of the actions, and the sense of caution or gravity with which they are pursued,

would naturally lessen for both health care professionals and for the public. By legalizing the practices, we will blunt our moral sensibilities and perceptions." New York State Task Force Report at 131-32.

Such a change in our national attitude about issues of life and death—if there is to be one at all—should manifest itself in the first instance through changes in the laws of the States; it should not be forced upon the Nation through judicial fiat.

III. CONCLUSION

The decision of the United States Circuit Court of Appeals for the Ninth Circuit should be reversed, and the matter remanded with direction to grant summary judgment to the Petitioners.

Respectfully submitted this 27th day of December, 1996.

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